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In the Supreme Court of the United States
OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,
PETITIONER

v.

TOM GALLAGHER,
FLORIDA INSURANCE COMMISSIONER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE
COMPTROLLER OF THE CURRENCY AS AMICI
CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether 12 U.S.C. 92, which provides that national banks in places with no more than 5,000 inhabitants may act as insurance agents, preempts a state law that prohibits most such banks from engaging in most insurance agency activities.

TABLE OF CONTENTS

	Page
Interest of the United States and the Comptroller of the Currency	1
Statement	2
Summary of argument	5
Argument	8
I. Section 626.988 was not enacted "for the purpose of regulating the business of insurance"	10
II. Section 92 "specifically relates to business of insurance"	17
Conclusion	24

TABLE OF AUTHORITIES

Cases:	
<i>Davis v. Elmira Sav. Bank</i> , 161 U.S. 275 (1896) .	12-13, 21
<i>Easton v. Iowa</i> , 188 U.S. 220 (1903)	22
<i>Elliott v. ITT Corp.</i> , 764 F. Supp. 102 (N.D. Ill. 1991)	16
<i>FCC v. Beach Communications, Inc.</i> , 113 S. Ct. 2096 (1993)	15
<i>FTC v. Dixie Finance Co.</i> , 695 F.2d 926 (5th Cir.), cert. denied, 461 U.S. 928 (1983)	16
<i>Farmers' & Mechanics' Nat'l Bank v. Dearing</i> , 91 U.S. 29 (1876)	22
<i>Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta</i> , 458 U.S. 141 (1982)	9
<i>First National Bank v. California</i> , 262 U.S. 366 (1923)	22
<i>Glendale Fed. Sav. & Loan Ass'n v. State Dep't of Ins.</i> , 587 So.2d 534 (Dist. Ct. App. 1991), re- view denied, 599 So.2d 656 (Fla. 1992)	15

Cases—Continued:

	Page
<i>Group Life & Health Ins. Co. v. Royal Drug Co.</i> , 440 U.S. 205 (1979)	12
<i>Heller v. Doe</i> , 113 S. Ct. 2637 (1993)	15
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	9
<i>John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank</i> , 114 S. Ct. 517 (1993)	19-20
<i>Morales v. Trans World Airlines, Inc.</i> , 504 U.S. 374 (1992)	17
<i>NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.</i> , 115 S. Ct. 810 (1995)	1
<i>New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.</i> , 115 S. Ct. 1671 (1995) .	17
<i>Owensboro Nat'l Bank v. Stephens</i> , 44 F.3d 388 (6th Cir. 1994), petition for cert. pending, No. 95-74	2, 9
<i>Paul v. Virginia</i> , 75 U.S. (8 Wall.) 168 (1869)	21
<i>Production Credit Ass'n's v. Department of Ins.</i> , 356 So.2d 31 (Fla. Dist. Ct. App. 1978),.....	15
<i>SEC v. National Securities, Inc.</i> , 393 U.S. 453 (1969)	11, 12, 16
<i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983) ...	17-18
<i>Union Labor Life Ins. Co. v. Pireno</i> , 458 U.S. 119 (1982)	10, 12
<i>United Services Auto. Ass'n v. Muir</i> , 792 F.2d 356 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987)	11, 16
<i>United States Dep't of Treasury v. Fabe</i> , 113 S. Ct. 2202 (1993)	5, 9, 10, 11, 16, 18, 22
<i>United States v. South-Eastern Underwriters Ass'n</i> , 322 U.S. 533 (1944)	22
Constitution and statutes:	
U.S. Const.:	
Amend. XIV	15
Art. I, § 8, Cl. 3 (Commerce Clause)	20, 22

Statutes—Continued:

	Page
Act of Sept. 7, 1916, ch. 461, 39 Stat. 753 (12 U.S.C. 92)	21
Bank Holding Company Act of 1956, § 4(d),12 U.S.C. 1843(d)	3
Competitive Equality Banking Act, Pub. L. No. 100-86, Tit. II, § 201(B)(5), 101 Stat. 583	19, 20
Federal Reserve Act, § 13, 12 U.S.C. 92	<i>passim</i>
Garn-St. German Depository Institutions Act of 1982, Pub. L. No. 97-370, Tit. IV, § 403(b), 96 Stat. 1511 ..	21
McCarran-Ferguson Act, § 2(b), 15 U.S.C. 1012(b) ...	<i>passim</i>
National Bank Act, 12 U.S.C. 21 <i>et seq.</i>	1
12 U.S.C. 371	21
12 U.S.C. 1972	14
Fla. Stat. Ann. (West 1984 & Supp. 1995):	
§ 626.988	<i>passim</i>
§ 626.988(1)(a)	11, 15
§ 626.988(b)	15
§ 626.9551 (West 1984)	14
Miscellaneous:	
<i>Black's Law Dictionary</i> :	
(5th ed. 1979)	17
(6th ed. 1990)	18
91 Cong. Rec. (1945):	
p. 488	23
p. 1396	23
p. 1487	18, 22
H.R. 27, 100th Cong., 1st Sess. (1987)	20
H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. (1987)	20
<i>Webster's Third New International Unabridged Dictionary</i> (1986)	18
S. Rep. No. 536, 97th Cong., 2d Sess. (1982)	21
S. Rep. No. 19, 100th Cong., 1st Sess. (1987)	19
23 Weekly Comp. Pres. Docs. 918 (1987)	20

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**BRIEF FOR THE UNITED STATES
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**INTEREST OF THE UNITED STATES AND
THE COMPTROLLER OF THE CURRENCY**

The Comptroller of the Currency is the primary regulator of banks chartered under the National Bank Act, 12 U.S.C. 21 *et seq.* See *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995). The Comptroller accordingly has an interest in assuring that national banks are able to exercise, subject to his supervision, the powers granted to them by Congress, including the power to engage in insurance agency activities set out in 12 U.S.C. 92. The United States also has an interest in

the proper interpretation of the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, on which the court of appeals relied in holding that Section 92 does not preempt the state law at issue here. The Comptroller participated as an amicus curiae before the court of appeals in this case, and the United States is an intervening party in *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), petition for cert. pending, No. 95-74, which held that Section 92 preempts a Kentucky statute similar to the Florida statute at issue in this case. The United States and the Comptroller filed a brief as amici curiae in support of the petition in this case.

STATEMENT

1. Petitioner Barnett Bank of Marion County, N.A., is a national bank with a branch in Bellevue, Florida, a town with fewer than 5,000 inhabitants. Petitioner is a wholly owned subsidiary of Barnett Banks, Inc., a Florida bank holding company. Pet. App. 20a; see also Pet. ii.

In October, 1993, petitioner purchased the assets and business of Linda Clifford Insurance, Inc. (LCI), an insurance agency also located and doing business in Bellevue. LCI's employees, including Clifford, became employees of petitioner. Pet. App. 20a. Four days after the purchase, respondent Gallagher, the state Insurance Commissioner, ordered Clifford and LCI to cease and desist from engaging in any "insurance agency activity" other than sales of credit life or credit disability insurance. *Id.* at 19a.

Respondent's order relied on Fla. Stat. Ann. § 626.988 (West 1984 & Supp. 1995) (*reprinted at* Pet. 4-5), which generally prohibits an otherwise licensed insurance agent from engaging in "insurance agency

activities" if he or she is associated in any way with a "financial institution." Under the statute, "insurance agency activities" include the sale or servicing of insurance policies other than credit life or credit disability policies, and the term "financial institution" includes (among other things) most banks and bank holding companies, including petitioner. Fla. Stat. Ann. § 626.988(1)(a) and (b) (West 1984 & Supp. 1995). However, the definition of "financial institution" excludes any bank "which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000." *Id.* § 626.988(1)(a).¹ Thus, in the case of small towns, the state prohibition applies only to banks that are, like petitioner, affiliated with bank holding companies; independent banks in such places are not forbidden to act as insurance agents.

2. Petitioner sued respondents Gallagher and the Florida Department of Insurance for declaratory and injunctive relief, contending that federal law preempts application of Section 626.988 to prohibit petitioner's operation of LCI. Petitioner relied on Section 13, para. 11, of the Federal Reserve Act, 12 U.S.C. 92, which provides that any national bank located and doing business in a place with no more than 5,000 inhabitants may, under supervision by the Comptroller, "act as the agent for any fire, life, or

¹ The definition also excludes any bank holding company exempted from regulation by the Federal Reserve Board under Section 4(d) of the Bank Holding Company Act of 1956, 12 U.S.C. 1843(d) (relating to companies that have held a small bank since before July 1, 1968). Neither exclusion applies to petitioner.

other insurance company" that is authorized to do business in that State. See Pet. App. 18a.²

The district court denied petitioner's request for relief. Pet. App. 17a-36a. The court recognized that Section 626.988 was inconsistent with Section 92. Pet. App. 23a-24a. However, the court accepted respondents' argument that Section 626.988 was saved from preemption by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). See Pet. App. 25a-35a. That Act provides that federal law will not preempt a state statute "enacted * * * for the purpose of regulating the business of insurance," unless the federal law "specifically relates to the business of insurance." 15 U.S.C. 1012(b). The district court concluded that Section 626.988 was enacted "for the purpose of regulating the business of insurance." Pet. App. 26a-32a. The court then held that Section 92 does not "specifically relate[] to the business of insurance," and otherwise "fails to manifest any express intent to preempt state insurance laws." Pet. App. 32a-35a. The court accordingly sustained the State's application of Section 626.988 to prevent petitioner from operating LCI.

3. The court of appeals affirmed. Pet. App. 1a-16a. The court first held that it had jurisdiction to decide petitioner's claim. *Id.* at 5a-6a. The court then examined Florida law (*id.* at 8a-13a), and concluded that the aim of Section 626.988 is to protect insurance policyholders by preventing "the loss of arm[']s-

² Respondent Gallagher, joined by several associations of Florida insurance agents, counterclaimed for a judgment declaring that petitioner was acting beyond any insurance agency authority conferred by Section 92. See Pet. App. 3a, 19a. Neither court below considered or passed on that issue. See *id.* at 3a, 36a.

length transactions and objectivity" that might occur when "[a] bank becomes involved with insurer and insured." Pet. App. 12a. The court therefore agreed that Section 626.988 "regulates the business of insurance" for purposes of the McCarran-Ferguson Act.

Turning to 12 U.S.C. 92, the court concluded (Pet. App. 13a-15a) that the history of that Section, and its relationship to the National Bank Act and the Federal Reserve Act, indicated that in enacting it "Congress was concerned with banking, not insurance." *Id.* at 15a. For that reason, the court agreed with the district court's determination that Section 92 neither "specifically relates to the business of insurance" nor otherwise "specifically requires" the preemption of conflicting state laws. Pet. App. 15a (quoting 15 U.S.C. 1012(b) and *United States Dep't of the Treasury v. Fabe*, 113 S. Ct. 2202, 2211 (1993)).

SUMMARY OF ARGUMENT

As applied to petitioner in this case, Florida's prohibition on insurance agency activities by bank affiliates conflicts with 12 U.S.C. 92's authorization of such activities by certain national banks. The court of appeals erred in concluding that the McCarran-Ferguson Act, 15 U.S.C. 1012(b), saves the state law from preemption. That Act prevents preemption only if two conditions are met: the state law must have been "enacted * * * for the purpose of regulating the business of insurance," and the conflicting federal law must not "specifically relate" to that business. Neither condition is satisfied in this case.

1. Fla. Stat. Ann. § 626.988 (West 1984 & Supp. 1995) was not enacted for the purpose of regulating

the business of insurance. The state law does not specify generally applicable standards or practices for insurance companies or agents, or regulate either the transfer or spreading of risk, or any other practice that is an integral part of the policy relationship between insurer and insured. Instead, it simply prohibits most financial institutions from acting as agents for the sale of most forms of insurance. The practical effect of Section 626.988 indicates that, in enacting it, the State was more concerned with restricting the activities of banks and their affiliates than with regulating the conduct of the business of insurance.

The insurance-regulation motivations suggested for the State's prohibition on bank-affiliated agencies are implausible. That prohibition may be upheld only if it meets the requirements of 15 U.S.C. 1012(b), which specifically mandates a practical and realistic inquiry into the State's "purpose" in enacting it. Such an appraisal indicates that Section 626.988 does not meet the first requirement for protection under Section 1012(b). If the State was concerned with banks' adopting coercive lending practices, or otherwise taking advantage of their banking customers, in connection with agency sales of insurance, then the provision seems best characterized as an attempt to regulate the business of banking, not the business of insurance. If, on the other hand, the State's prohibition was intended to protect other insurance agents from having to compete against agents affiliated with banks, then it was not aimed at protecting the relationship between insurers and their insureds. In either case, the state law was not "enacted * * * for the purpose of regulating the business of insurance." 15 U.S.C. 1012(b).

2. Whether or not Section 626.988 satisfies the first condition for protection under the McCarran-Ferguson Act, 12 U.S.C. 92 "specifically relates to the business of insurance" within the meaning of that Act. The "specifically relates" standard applicable to the federal law is, as a matter of statutory language, considerably broader than the requirement that a state law have been enacted "for the purpose of regulating" the insurance business. Section 92 meets the "specifically relates" standard, because it authorizes certain banks to participate in the insurance business.

The court of appeals' arguments to the contrary are not persuasive. The court incorrectly focused on whether, in enacting Section 92, Congress was "concerned with banking," rather than on whether the federal provision relates to the business of insurance. The court's reliance on the fact that Section 92 was enacted at a time when Congress was thought to lack power to regulate the insurance business is also misplaced, because there can be little question that Congress always correctly understood that it had the power to authorize national banks to engage in that business on the same terms as others. And the court failed to recognize that 15 U.S.C. 1012(b) requires only that a federal provision "specifically relate[]" to the insurance business, not that it expressly state its intent to preempt state law.

Finally, respondents cannot have it both ways. If Section 626.988 was enacted by the State for the "purpose" of regulating the business of insurance because it limits the ability of some financial institutions to sell insurance, then 12 U.S.C. 92 must certainly "specifically relate[]" to the business of insurance by authorizing national banks to engage in

precisely the same activities. The court of appeals has chosen an interpretation of the two McCarran-Ferguson conditions that is internally inconsistent. Because that is the only interpretation on which respondents could prevail in this case, the judgment below should be reversed.

ARGUMENT

Section 13, para. 11, of the Federal Reserve Act, 12 U.S.C. 92, provides in relevant part that national banks

located and doing business in any place the population of which does not exceed five thousand inhabitants * * * may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent.

Fla. Stat. Ann. § 626.988 (West Supp. 1995), on the other hand, prohibits any insurance agent associated with a bank that is owned by a holding company from selling "any policy or contract of insurance other than credit life insurance or credit disability insurance."

Both courts below acknowledged (see Ret. App. 3a, 8a, 23a-24a) that the state and federal laws are in irreconcilable conflict. Under 12 U.S.C. 92, any

national bank located in a place with 5,000 or fewer inhabitants "may" act as an agent for "any fire, life or other insurance company." Under Section 626.988(1)(a), however, such a bank may not undertake the same activities (other than sales of credit life or credit disability insurance) unless it is "not a subsidiary or affiliate of a bank holding company." Florida's restriction thus stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in authorizing certain national banks to act as insurance agents. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Under normal principles of federal supremacy, the state prohibition must give way to the explicit federal authorization. See, e.g., *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-156 (1982); *Owensboro Nat'l Bank v. Stephens*, 44 F.3d 388, 392 (6th Cir. 1994).

The question in this case is whether those principles of preemption are superseded, in this instance, by Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b). See *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2211 (1993). That Act provides that a federal law should not be held to preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the federal law "specifically relates to the business of insurance." 15 U.S.C. 1012(b). In applying the Act in this case, the court of appeals held that Section 626.988 was "enacted * * * for the purpose of regulating the business of insurance," and that Section 92 does not "specifically relate[] to the business of insurance." The court erred on both counts.

I. SECTION 626.988 WAS NOT ENACTED "FOR THE PURPOSE OF REGULATING THE BUSINESS OF INSURANCE"

1. This Court has held that state laws are enacted "for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act if they "possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Fabe*, 113 S. Ct. at 2210. Section 626.988, however, does not affect how the insurance business is conducted in Florida. It imposes no standard, and requires or forbids no practice, related to the substance of that business. It regulates neither the "transferring or spreading [of] a policyholder's risk," nor any other practice that is "an integral part of the policy relationship between the insurer and the insured." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982); see also *Fabe*, 113 S. Ct. at 2209; *id.* at 2213-2216 (Kennedy, J., dissenting).

Section 626.988 instead regulates the conduct of "financial institutions," including certain national banks, by generally prohibiting them from acting as or affiliating with insurance agents. That prohibition applies even if a bank complies with all of the State's generally applicable rules and regulations governing the conduct of insurance agents or the insurance business. In this case, for example, Linda Clifford was State-licensed, active, and in good standing as a "life, health and general lines insurance agent." Pet. App. 20a. The day after petitioner acquired her agency, however, Clifford automatically lost her ability under Florida law to act as an agent in the sale of anything other than credit life or credit disability insurance—even if all her customers, and all the

insurers that underwrote the policies she sold them, remained unchanged.

The McCarran-Ferguson Act "focus[es] * * *" upon the relationship between the insurance company and the policyholder." *Fabe*, 113 S. Ct. at 2208, citing *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) ("The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.'"). The practical operation of Section 626.988, on the other hand, indicates that, in enacting it, the State was concerned with restricting the activities of banks and their affiliates, rather than with regulating the conduct of the business of insurance. The relationship proscribed in this case, between an otherwise qualified insurance agent and a bank, "has no integral connection to the relationship between the insured and insurer." *United Services Auto. Ass'n v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987).

In this connection, it is important to note that, with respect to banks located in places with fewer than 5,000 inhabitants—that is, with respect to essentially the same banks that 12 U.S.C. 92 authorizes to act as insurance agents—Section 626.988 applies only to a bank that, like petitioner, is "a subsidiary or affiliate of a bank holding company." § 626.988(1)(a). That limitation emphasizes the fact that the state proscription does not focus on the relationship between the insurer and insured, but on restricting the activities of banks affiliated with bank holding companies (as distinguished from banks that are independently owned). State regulation of that kind is remote from the concerns of the McCarran-Ferguson

Act. In that respect, this case is much like *National Securities*, in which this Court held that a law requiring the state insurance commissioner to certify that an insurance company merger was not inequitable to stockholders fell outside the protection of the Act. The Court there emphasized that the State was "not attempting to secure the interests of those purchasing insurance policies," but rather had "focused its attention on stockholder protection." *National Securities*, 393 U.S. at 460; see also *Pireno*, 458 U.S. at 132 (insurer's use of advisory peer review committee was "a matter of indifference to the policyholder," and not part of the "business of insurance"); *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 213-214 (1979) (insurer's own contracts with pharmacies to provide benefits to policyholders were not part of insurance business); *Fabe*, 113 S. Ct. at 2208-2209 (discussing prior cases).

2. We do not dispute that "[t]he selling * * * of policies * * * and the licensing of * * * agents" can be part of the "business of insurance." See *National Securities*, 393 U.S. at 460. Many state sales and licensing regulations may indeed be "enacted * * * for the purpose of regulating" that business within the meaning of 15 U.S.C. 1012(b).

Generally applicable education, experience, or financial responsibility requirements for obtaining an insurance agency license would, for example, presumably meet that standard. The government has never argued that Section 92 would preempt the application of such reasonable and generally applicable regulations, so long as they are neither designed nor applied differentially to exclude national banks from undertaking insurance activities authorized by federal law. Cf. *Davis v. Elmira Sav. Bank*, 161 U.S.

275, 290 (1896) (national banks' activities are subject to the operation of "general and undiscriminating state laws" that "do not conflict with the letter or the general objects and purposes of Congressional legislation."). McCarran-Ferguson's protection would also presumably extend to reasonable categorical exclusions relevant to the protection of present or potential policyholders, such as rules prohibiting the operation of insurance agencies by convicted felons or by persons previously found to have committed fraud. The prohibition at issue in this case, however, is of a different sort.

The court of appeals held that Section 626.988 "regulates the business of insurance because it protects policyholders." Pet. App. 13a. It based that conclusion on the ground that the state law safeguards "the financial stability of insurance companies" by preventing improper "pressures" that "could force an insurer to assume a bad risk to quickly consummate a bank loan, or could push a bank customer to take out unnecessary insurance where the bank's only motive is profit." *Id.* at 12a. Those are implausible motivations for prohibiting insurance agents from affiliating with banks owned by bank holding companies.

It is not clear how a bank-affiliated agency could "force an insurer to assume a bad risk to quickly consummate a bank loan." Pet. App. 12a. Insurance underwriters always retain the discretion to decide which risks to insure, regardless of the wishes of their agents. The only situation we can imagine in which a bank-affiliated agency might be in a position "force" the acceptance of a bad risk would be if the loan to be "quickly consummate[d]" were a loan to the underwriter itself. That "risk" would seem to depend on two assumptions. First, the insurance company

would have to be so eager to obtain a particular bank loan that it would consider compromising its underwriting standards—which are, no doubt, themselves closely regulated by state authorities—in order to do so. Second, the bank would have to choose to take advantage of that situation by illegally “tying” a loan to the insurance company’s provision of insurance to the bank’s customers, rather than simply by charging a higher rate or fee for the loan.³ Both assumptions seem quite likely.

The risk that a bank-affiliated agent might “push a bank customer to take out unnecessary insurance where the bank’s only motive is profit” (Pet. App. 12a) is somewhat more realistic. That risk poses no threat to “the financial stability of insurance companies,” however, which presumably could only be *enhanced* by sales of “unnecessary” insurance. Overly zealous sales practices might be thought to threaten harm to potential insurance buyers, but that threat bears little connection to whether or not a particular agent is affiliated with a bank. All insurance agents have a profit motive for selling policies to customers, so the argument must again relate to the possibility of “tying” the sale of a policy to the approval of a bank loan (this time to the potential insurance buyer), or to some other possible abuse of the bank’s relationship with its banking customers. But both state and federal law separately prohibit such tying. See Fla. Stat. Ann. § 626.9551 (West 1984); 12 U.S.C. 1972. Moreover, Section 626.988 not only allows small-town banks not affiliated with a holding company, as well as

³ Federal law prohibits national banks from tying the extension of credit to the purchase or provision of any other product or service. 12 U.S.C. 1972.

certain bank holding companies, to act as agents for all forms of insurance, it also allows all banks to sell credit life and credit disability insurance—which could be closely linked with the bank’s consumer loans, and which would therefore seem to be the most likely candidates for illegal “tying” schemes. Fla. Stat. Ann. § 626.988(1)(a) and (b) (West 1984 & Supp. 1995). Those exemptions are inexplicable if, as the court below posited (Pet. App. 12a), the state prohibition was intended to protect consumers from particular dangers inherent in the sale of insurance by banks.

We do not mean to suggest that the legislative goals suggested by the court of appeals are so insubstantial that the state law is not a rational exercise of the State’s general legislative powers. If challenged under the Fourteenth Amendment, a State’s economic and commercial regulations are presumed to be valid; any inquiry into the legislature’s “actual” purposes is generally inappropriate, and the question is only whether “there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Heller v. Doe*, 113 S. Ct. 2637, 2642-2643 (1993), quoting *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993). As the court of appeals pointed out (Pet. App. 11a-12a), two state appellate decisions have held that Section 626.988 meets that standard, based on possible legislative purposes much like those posited by the court in this case. *Glendale Fed. Sav. & Loan Ass’n v. State*, 587 So. 2d 534, 536-537 & n.1 (Dist. Ct. App. 1991), review denied, 599 So. 2d 656 (Fla. 1992); *Production Credit Ass’ns v. Department of Insurance*, 356 So. 2d 31 (Fla. Dist. Ct. App. 1978).

This case involves quite a different challenge. The state law in question, as applied to petitioner, conflicts directly with a federal law. Its application to petitioner may therefore be upheld only if the law meets the special requirements of the McCarran-Ferguson Act, which specifically mandates an inquiry into the State's actual "purpose" in enacting it. 15 U.S.C. 1012(b); see *Fabe*, 113 S. Ct. at 2209-2210 & n.6 (emphasizing "purpose" requirement). That inquiry is practical and realistic, not purely conjectural. Cf. *National Securities*, 393 U.S. at 457, 460 (focusing on State's actual purpose in enacting law restricting insurance company mergers).

Such an appraisal of Section 626.988 indicates that it does not meet the first requirement for protection under Section 1012(b). If the State's concern was with banks' adopting coercive lending practices or otherwise taking advantage of their customers, then Section 626.988 is best characterized as an attempt to regulate the business of *banking*, not the business of insurance. See *FTC v. Dixie Finance Co.*, 695 F.2d 926, 930 (5th Cir.) (App. A) (tying), cert. denied, 461 U.S. 928 (1983); *Elliott v. ITT Corp.*, 764 F. Supp. 102, 105 (N.D. Ill. 1991). If, on the other hand (as seems most likely), Section 626.988 was intended to protect insurance agents from having to compete against agents affiliated with banks, see *United Services Auto. Ass'n v. Muir*, 792 F.2d at 364, then it was not in any meaningful sense "aimed at protecting or regulating," even "indirectly," "the relationship between the insurance company and its policy-holders." *Fabe*, 113 S. Ct. at 2208; see *National Securities*, 393 U.S. at 460 ("The crucial point is that here the State * * * is not attempting to secure the interests of those purchasing insurance policies.").

In either case, Section 626.988 was not "enacted * * * for the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act.

II. SECTION 92 "SPECIFICALLY RELATES TO THE BUSINESS OF INSURANCE"

Even if the court of appeals was correct in concluding that Section 626.988 satisfied the first requirement for protection from preemption under the McCarran-Ferguson Act, 12 U.S.C. 92 nonetheless preempts application of the state law to petitioner. McCarran-Ferguson defeats the normal preemptive effect of federal law only if a state law was enacted for the purpose of regulating the business of insurance *and* if the conflicting federal law does not specifically relate to that business. 15 U.S.C. 1012(b). We believe that Section 92 does "specifically relate[]" to the insurance business for these purposes. In all events, if Section 626.988 was enacted for the purpose of *regulating* that business, as the court of appeals concluded, then Section 92 certainly "specifically relates" to the insurance business for McCarran-Ferguson purposes.

- As this Court has recognized, the term "relating to" is a broad one, meaning "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)); see also *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671, 1677-1680 (1995) (interpreting term "relate to" in preemption provision of Employee Retirement Income Security Act of 1974 (ERISA)); *Shaw v. Delta Air Lines, Inc.*,

and the law which it makes is its own. The term "bank" encompasses more than is contained by the use of the word "insurer," which connotes control, direction, or government of an ongoing activity, rather than mere management. See Bank's Law Dictionary (1986-1988) at 1990; Webster's Third New International Dictionary (1966) at 200. See also, the Bank's role as an "agent" managing and "adjusting, managing, or controlling."

Under Section 92(b), a federal law must specifically relate⁴ to the business of insurance to confer a preemptive immunity from state law. As the Court has noted, the history of the McCarran-Ferguson Act confirms that by using the language "relate to" the drafters intended that federal law "merely . . . relating to insurance companies" would not preempt state insurance laws by implication. Indeed, before preemption was authorized, the drafters had written to assure that the Congress, in its "discretion . . . act[ed] specifically with reference to insurance in amending the Federal law." Pub. L. No. 211 (1932), quoting H. Comp. Res. 1057, 75th Congress, 2d Sess. (Ferguson).

Although Section 92 does not appear to regulate the business of insurance, it does, if it meets the "specifically related" standard, Section 92 authorizes certain national banks to do so. It authorizes any bank, life, or other insurance company authorized to do business in the state in which it is located and "to do with the insurance company for which [the bank] may be engaged in Section 92 apart from authorizing the Commissioner to prescribe such rules and regu-

lations" as he deems necessary to regulate those activities. Congress added two specific provisos: The bank may guarantee neither the payment of any premium on a policy issued through its agency, nor the truth of any statement made by a customer in applying for insurance. Section 92 therefore both permits banks to operate insurance agencies, and places specific limits on a bank's ability to interpose itself, as agent, in the relationship between insurer and insured. Those statutory functions unquestionably "specifically relate[] to the business of insurance for the preemption-related purposes of the McCarran-Ferguson Act.⁴ See *John Hancock Mut.*

⁴ In recent years the banking and insurance industries, and their respective legislative supporters, have focused in part on Section 92, precisely because it has been seen as specifically authorizing at least some degree of incursion by banks into "the business of insurance." In 1987, Congress imposed a one-year moratorium on, among other things, any expansion of a national bank's "insurance agency activities pursuant to the Act of September 7, 1916 (12 U.S.C. 92), into places where [the bank] was not conducting such activities as of March 5, 1987." Competitive Equality Banking Act of 1987 (CEBA), Pub. L. No. 100-26, Tit. II, § 201(b)(5), 101 Stat. 583. The Senate Banking committee's report on that legislation, including strongly worded dissenting views, indicates that dispute over the proper interpretation of Section 92 was one aspect of a fierce legislative struggle over continuing limitations on banks' ability to enter and compete in the securities, real estate, and insurance businesses. See, e.g., S. Rep. No. 19, 100th Cong., 1st Sess. 3-4, 16-17 (specifically noting dispute over scope of insurance agency authority conferred by Section 92), 86-87 (dissenting views), 89-93 (dissenting views) (1987). Senator Garn's dissenting views, for example, complained that the proposed legislation would "coddle[] the securities, insurance, and real estate industries by moving backwards toward protected, segmented markets and easy profits," *id.* at 89, and specifically empha-

Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 525 (1993) (ERISA “obviously and specifically relates to the business of insurance”).

2. The court of appeals held that Section 92 did not “specifically relate[]” to the insurance business, in part because the court concluded that in enacting the statute “Congress was concerned with banking, not insurance.” Pet. App. 15a. That is a *non sequitur*. Unlike the first part of the McCarran-Ferguson pre-emption test, which requires inquiry into the existence of a legislative “purpose to regulate the business of insurance,” the second part focuses on whether the provision in question has some objective relationship to the insurance business. We may certainly assume that in authorizing national banks in small towns to sell insurance, Congress’s primary purpose was to regulate banking. But the regulation Congress imposed gave certain banks the authority to act as agents for the sale of insurance. Whatever its primary regulatory purpose, such a law plainly and

sized that “the involvement of state-chartered [as opposed to national] banks in the insurance business has produced demonstrable competitive benefits to consumers in those states; yet the bill’s moratorium moves squarely in the direction of ending that for the benefit of a protected insurance industry” (*id.* at 92). See also CEBA §§ 201(d) (“Nothing in this [moratorium] section may be construed to increase or reduce the insurance authority of * * * national banks under current law.”) and 201(e) (dealing with “insurance activities” of state-chartered banks); H.R. Conf. Rep. No. 261, 100th Cong., 1st Sess. 147-150 (1987); Statement by President Ronald Reagan upon Signing H.R. 27, 100th Cong., 1st Sess., 23 Weekly Comp. Pres. Docs. 918 (1987) (criticizing “retrogressive moratorium on the ability of Federal bank regulators to authorize [banks to offer] new real estate, securities, and insurance products and services to consumers”).

specifically relates to the business of insurance by permitting some banks to engage in one aspect of that business.⁵

The court of appeals also reasoned that Section 92 could not relate to the business of insurance because it was passed at a time when the regulation of that business was thought to lie beyond the scope of congressional power under the Commerce Clause. Thus, “Congress could not have been attempting to regulate a business that it believed it had no power to regulate.” Pet. App. 15a (citing *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868)). That analysis, however, again confuses the McCarran-Ferguson inquiry whether a state law seeks to regulate the business of insurance with the question whether the conflicting federal law “specifically relates” to that business. Whatever else Congress may have intended when it enacted Section 92, it surely sought to authorize national banks operating in small towns to act as insurance agents. There is no reason to doubt that Congress has always correctly understood that it had the power to grant such authority to national banks, which have, since their creation, been recognized as

⁵ Section 92 formerly also authorized small-town national banks also to “act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located.” Act of Sept. 7, 1916, ch. 461, 39 Stat. 753; see 12 U.S.C. 92 note. Congress deleted that language in 1982. Garn-St. German Depository Institutions Act of 1982, Pub. L. No. 97-320, Tit. IV, § 403(b), 96 Stat. 1511. The change conformed Section 92 to the amended provisions of 12 U.S.C. 371, which “simplif[ed] the statutory framework by which national banks are authorized to engage in real estate activities” by deleting “rigid statutory standards” and authorizing the Comptroller to promulgate regulations. S. Rep. No. 536, 97th Cong., 2d Sess. 60 (1982).

"instruments designed to be used to aid the [national] government in the administration of an important branch of public service." *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 33 (1876); see also, e.g., *First Nat'l Bank v. California*, 262 U.S. 366, 368-69 (1923); *Easton v. Iowa*, 188 U.S. 220, 238 (1903); *Davis v. Elmira Sav. Bank*, 161 U.S. at 283.⁶

Finally, the court of appeals read too much into this Court's statement in *Fabe* that the McCarran-Ferguson Act "is, in effect, a clear statement rule" that state laws regulating the insurance business "do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise." Pet. App. 13a (quoting *Fabe*, 113 S. Ct. at 2211). The Act itself requires only that a federal law "specifically relate[]" to the business of insurance; it does not require, as the opinion below suggests, that the provision expressly state that conflicting state laws will be preempted. Indeed, such a requirement would make little sense. The McCarran-Ferguson Act was intended, at the time of its passage, to provide preemption rules for both existing and future laws. *Fabe*, 113 S. Ct. at 2211 (quoting 91 Cong. Rec. 1487 (1945) (statements of Sens. Ferguson and O'Mahoney)). Other than by coincidence, however, past laws would have been unlikely to contain language complying with a drafting requirement that was not imposed until after their enactment. And future laws that

⁶ In *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 556-559 (1944), which upheld a price-fixing suit against an association of insurance companies, this Court rejected the argument that Congress must have intended to exclude the insurance business from the Sherman Act because at the time that Act was passed Congress was thought to have no power to regulate that business under the Commerce Clause.

specify their preemptive effect upon state law have no need for the sort of general preemption rule that McCarran-Ferguson provides.⁷

3. Finally, if the court of appeals was correct to conclude that Section 626.988 was enacted "for the purpose of regulating the business of insurance" within the meaning of McCarran-Ferguson, then Section 92 must certainly "specifically relate[]" to that business for purposes of the Act. Section 92 and Section 626.988 conflict because they are in large part mirror images, one authorizing and one forbidding certain insurance agency activities on the part of certain national banks. If Florida's effort to preclude small-town banks (when owned by or affiliated with holding companies) from selling insurance is a regulation of "the business of insurance," then Congress's express permission for them to do so must certainly "specifically relate[]" to the same business.

The court of appeals' holding to the contrary is internally inconsistent. As discussed above, in our view Section 622.988 was not enacted for the purpose of regulating the insurance business, while Section 92 specifically relates to that business. That analysis depends on the fact that the term "relates" is considerably broader in application than the term "regulate." It might be plausible to hold that both Florida's attempt to restrict banks from acting as insurance

⁷ As originally approved, the Act stated that "[n]o act of Congress * * * shall be construed to invalidate, impair or supersede" state laws "enacted for the purpose of regulating the business of insurance * * * unless such act specifically so provides." 91 Cong. Rec. 488 (1945) (Senate); *id.* at 1085 (House) (emphasis added). That language was rejected in conference, and replaced by the "specifically relates" language of the present Section 1012(b). 91 Cong. Rec. 1396 (1945).

agents, and Section 92's limited permission to certain banks to do so, "concern banking, not insurance." Pet. App. 14a-15a. In that case, the McCarran-Ferguson Act would have no application, and federal law would prevail. Alternatively, one might possibly conclude that the state law was enacted to regulate, and that the federal law specifically relates to, "the business of insurance," in which case McCarran-Ferguson allows preemption by its terms. It is wholly implausible, however, to treat the state law at issue here as one enacted to regulate the insurance business, while holding that a directly conflicting federal law does not even "relate" to that business. That implausible interpretation is the only one under which respondents could prevail in this case.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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